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this Memorandum Decision shall not
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of the case.

ATTORNEY FOR APPELLANT:

JOHN R. McKAY
Hickam & Lorenz
Spencer, Indiana

ATTORNEY FOR APPELLEE:

GLENN S. VICIAN
Bowman Heintz Boscia & Vician
Merrillville, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

LAWRENCE T. BURKS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 28A01-0611-CV-490
)	
AMERICAN ACCEPTANCE COMPANY, LLC.,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE GREENE SUPERIOR COURT
The Honorable J. David Holt, Judge
Cause No. 28D01-0507-CC-321 & 28D01-0507-CC-307

March 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Lawrence T. Burks appeals the trial court's judgment on his counterclaim against American Acceptance Company, LLC ("American"). Burks raises one issue, which we revise and restate as whether the trial court abused its discretion by denying Burks's request for attorney fees. We affirm.

The relevant facts follow. Burks resides in Solsberry, Indiana with his wife, Peggy. On one or more occasions prior to July 15, 2005, Burks received correspondence from American indicating that Burks owed certain delinquent credit accounts to American. American had purchased the accounts, designated under the names Larry T. Burks and Peggy J. Burks, from Bank One and Metris. Burks claimed that he had no knowledge of the claims and that he was not indebted to American. However, the parties are in dispute as to whether this was actually communicated to American.

On July 15, 2005, American filed a complaint against Burks to collect on the alleged debt. Burks hired counsel to defend the suit. Burks filed a counterclaim for abuse of process for fictitious claim against American. Burks filed and prevailed on a motion for summary judgment against American regarding the alleged debts. The trial court then held a hearing on Burks's counterclaim requesting attorney fees. The trial court found that Burks failed to prove his counterclaim by a preponderance of the evidence and denied his request for attorney fees.

The issue is whether the trial court abused its discretion by denying Burks's request for attorney fees. Burks maintains that the trial court's denial of his request for

attorney fees was contrary to the statutory law and the weight of the evidence in the case.

Burks's argument is based on Ind. Code § 34-52-1-1(b),¹ which provides:

* * * * *

In any civil action, the court may award attorney's fees as part of the cost to the prevailing party, if the court finds that either party:

- (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
- (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or

* * * * *

This court has held that:

[a] claim is "frivolous" if it is made primarily to harass or maliciously injure another; if counsel is unable to make a good faith and rational argument on the merits of the action; or if counsel is unable to support the action by a good faith and rational argument for extension, modification, or reversal of existing law. A claim is "unreasonable" if, based upon the totality of the circumstances, including the law and facts known at the time, no reasonable attorney would consider the claim justified or worthy of litigation. A claim is "groundless" if no facts exist which support the claim relied upon by the losing party.

America's Directories, Inc. v. Stellhorn One Hour Photo, Inc., 833 N.E.2d 1059, 1070 (Ind. Ct. App. 2005), trans. denied (internal citations omitted).

"The trial court's decision to grant or deny attorney fees will not be disturbed absent an abuse of discretion." Stephens v. Parkview Hosp., Inc., 745 N.E.2d 262, 267

¹ Burks actually cites to Ind. Code. § 34-1-32-1(b) in his brief. This statute was repealed and recodified at Ind. Code § 34-52-1-1, effective July 1, 1998. There was no substantive change in the law. Therefore, Burks's incorrect reference is harmless.

(Ind. Ct. App. 2001) (citing Venture Enters., Inc. v. Ardsley Dist. Inc., 669 N.E.2d 1029, 1033 (Ind. Ct. App. 1996), reh'g denied). An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” Pierce v. State, 705 N.E.2d 173, 175 (Ind. 1998). “When the trial court determines that attorney fees were not warranted under the statute permitting the award of attorney fees for bringing or pursuing a frivolous claim, we will review that conclusion *de novo*.” Stephens, 745 N.E.2d at 267 (citing Tipton v. Roerig, 581 N.E.2d 1279, 1282 (Ind. Ct. App. 1991)). “The party requesting assessment of attorney fees has the burden of proof at trial, and the losing party on the issue appeals a negative judgment.” Chrysler Motor Corp. v. Resheter, 637 N.E.2d 837, 838 (Ind. Ct. App. 1994), trans. denied (citations omitted). “We will reverse a negative judgment only if the evidence viewed most favorably to the trial court leads uncontrovertibly to a conclusion contrary to the one reached below.” Id.

Burks argues he was “compelled to expend significant sums of money” in order to defend against a claim that American should not have continued to litigate because American was placed on notice that Burks disputed the existence of the debt and the referenced accounts. Appellant’s Brief at 7. Further, Burks argues there was no “documentation (other than the bare documentation that they purchased from a former creditor) substantiating the validity of the debt, or any application for an underlying credit card account.” Appellant’s Brief at 6-7.

American argues that it had a valid basis upon which to file suit against Burk and this basis supports the trial court’s denial of attorney fees. At trial, American employee, Jennifer Lind, testified that American purchased certain debts and proceeded to attempt

to collect on them based on the information provided by the previous creditors. The documentation listing the debts that were purchased by American included the names of Larry and Peggy Burks as the debtors. It also listed an address, social security number, the balance owed, start date of the account, and date of last payment. It was based on this information that American decided to file suit. Lind testified that this is American's customary procedure for accepting and attempting to collect purchased accounts. In addition, Burks admitted at trial that Peggy had credit card accounts with both Bank One and Metris that had been discharged in bankruptcy. During the trial, American entered credit card statements showing debt for 'Larry T. Burks' into evidence.

While American was unsuccessful in obtaining a judgment against Burks, we cannot say that its action against Burks was frivolous, unreasonable, or groundless. American, following its customary procedures, used the information provided by the original creditors in deciding whether to file suit in order to collect a debt. We cannot say that American's claim was made to harass or maliciously injure Burks. Further, based on the information that American had at the time, we cannot say that the claim was not justified or worthy of litigation or that there were no facts in existence supporting their claim. Therefore, the trial court's denial of Burks's request for attorney fees was not contrary to statutory law and the evidence viewed most favorably to the trial court does not lead uncontrovertibly to a conclusion that is contrary to the one reached below. See, e.g., Chrysler Motor Corp., 637 N.E.2d at 841 (holding that the trial court did not err by denying attorney fees where the evidence does not lead uncontrovertibly to the conclusion that the party seeking the fees is entitled to them); Cf. McDonald v.

McDonald, 631 N.E.2d 522,524-525 (Ind. Ct. App. 1994), reh'g denied (holding that the facts ascertainable at the time of trial gave rise to the inference that the suit was instigated to harass the other party).

Burks argues that he is entitled to attorney fees based upon an abuse of process. This argument is without merit here.

An action for abuse of process requires a finding of misuse or misapplication of process for an end other than that which it was designed to accomplish. Abuse of process has two elements: (1) ulterior purpose or motives; and (2) a willful act in the use of process not proper in the regular conduct of the proceeding. If a party's acts are procedurally and substantively proper under the circumstances then his intent is irrelevant. A party may not be held liable for abuse of process if the legal process has been used to accomplish an outcome[,] which the process was designed to accomplish.

Watson v. Auto Advisors, Inc., 822 N.E.2d 1017, 1029 (Ind. Ct. App. 2005), trans. denied (internal citations omitted). Burks alleges no facts to support a claim that American had an ulterior purpose or motive or a use of process not proper within the normal prosecution of the case. See, e.g., Archem, Inc. v. Simo, 549 N.E.2d 1054, 1061 (Ind. Ct. App. 1990), reh'g denied, trans. denied (holding that "a party asserting abuse of process must show an ulterior motive and use of process that would not be proper in the normal prosecution of the case"). Therefore, we find that Burks is also not entitled to attorney fees based on an abuse of process theory.²

² Burks also requested that this court award appellate attorney fees for this appeal. Ind. Appellate Rule 66(E) provides that this court "may assess damages if an appeal, petition, or motion, or response, is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorneys' fees." Our discretion to award attorney fees is limited to instances when an appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." Orco v. Turco Mfg., Inc., 512 N.E.2d 151, 152 (Ind. 1987). An appellate tribunal must use extreme restraint in exercising its

For the foregoing reasons, the trial court did not abuse its discretion by denying Burks's request for attorney fees and we deny Burks's request for appellate attorney fees.

Affirmed.

SULLIVAN, J. and CRONE, J. concur

discretionary power to award damages on appeal "because of the potential chilling effect upon the exercise of the right to appeal." Tioga Pines Living Center, Inc. v. Ind. Family & Social Serv. Admin., 760 N.E.2d 1080, 1087 (Ind. Ct. App. 2001), affirmed on reh'g, trans. denied. Having determined that American's suit was not frivolous or an abuse of process and that Burks was not entitled to attorney fees at the trial level, we find that Burks is also not entitled to appellate attorney fees.